Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor

Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS J-02-32 OF 1995 AND J-02-33 OF 1995
MAHADEV SHANKAR, ABU MANSOR JJCA AND ABDUL MALEK AHMAD J
14 OCTOBER AND 23 NOVEMBER 1995

Civil Procedure *— Preliminary objection — Whether court should rule on preliminary issues — Preliminary objection raised after pleading was closed and action set down for trial — Issues raised needed to be clarified by evidence — Adjudication of preliminary issues would not conclusively end the trial but would contribute to further delay of case — Rules of the High Court 1980 O 33 r 2*

Land Law *— Restraints on dealings — Caveats — Wrongful entry — Damages — Whether beneficial owner entitled to damages against caveator for wrongfully caveating land — National Land Code 1965 s 329*

The respondents ('the plaintiffs') brought an action against the appellants ('the defendants') claiming that as beneficial owners of a piece of land ('the land'), they had suffered loss and damage and hence claimed damages against the defendants for wrongfully or without reasonable cause caveating the land and for wrongfully and maliciously conspiring to defraud and to injure the first plaintiff. The first plaintiff had purchased the land from the official receiver who was the liquidator of the registered owner of the land ('Mosbert Bhd') under an agreement dated 1 April 1981. The second defendant lodged a caveat over the land on the ground that by reason of subsequent re-assignments, the first defendant had re-assigned its rights over 30 sub-lots on the land to the second defendant. The caveat was subsequently removed pursuant to an application by the official receiver, in the name of Mosbert Bhd, and for and on behalf of the first plaintiff. The action was finally set down for trial on 7 November 1994, but prior to that date, the defendants applied by way of summons in chambers requesting the court to evoke O 33 r 2 of the Rules of the High Court 1980 ('the RHC') to determine certain preliminary issues.

The defendants' affidavit in support of the application stated that if these issues of law were determined by the court in favour of the defendants at the outset, the consequential effect could be that the plaintiffs' claim would be dismissed. The plaintiffs opposed the application contending that it was too late in the day for the defendants to file such an application as the writ itself, together with the statement of claim was filed on 9 May 1988; that pleadings had closed and that the action had been set down for trial.

A The trial judge dismissed the application with costs, hence this appeal. It was submitted on behalf of the defendants that the plaintiffs could not now claim for damages because they should have done so when praying for the removal of the caveat. The plaintiffs contended that the questions or issues raised in the pleadings cannot be tried by affidavits alone either to determine points of law or mixed law and facts.

Held, dismissing the appeals with cost:

(1) The trial judge was correct when he found the issues before him had no merit for the exercise of his discretion, bearing in mind the stage when the questions were posed, especially at almost the date fixed for the hearing of the case. It was also clear that the trial judge was of the opinion that the granting of the application would not conclusively end the trial but instead, would contribute to a further delay of the case.

The court agreed with the respondent in their submission that the appellants had failed to satisfy the court that their application, if allowed, will result in a substantial saving of time and expenditure, and it was true that the several questions or issues raised needed to be clarified by evidence and as such could not be considered to be preliminary points (see pp 261C–D, 262I and 264B–C).

(2) The plaintiffs should not be deprived from claiming compensation under s 329 of the National Land Code 1965 as when the official receiver sold the land to the first plaintiff on 1 April 1981, the caveat lodged by the second defendant had yet to exist. It was only when the first plaintiff attempted to effect the registration of the land itself that it was disclosed that the second defendant lodged the caveat.

Also, the first plaintiff was not a party to the proceedings when the official receiver, in the name of Mosbert Bhd, made an application to remove the caveat; therefore, estoppel could not operate against the first plaintiff who had not been a party to those proceedings.

Further, the fact that the official receiver did not claim damages could not then preclude the plaintiffs from pursuing their claim for damages on a separate action. The issues whether the second plaintiff had a cause of action and whether the first plaintiff could assign its rights to the second plaintiff could only be determined at the trial. The first plaintiff was a party to the proceedings and if the court found that the cause of action could not be assigned, that would not preclude the first plaintiff from pursuing the claim based upon interest before the assignment (see pp 263G–I and 264A–B).

[Bahasa Malaysia summary

Penentang-penentang ('plaintif-plaintif') memulakan suatu tindakan terhadap perayu-perayu ('defendan-defendan') dengan menuntut

bahawa sebagai pemunya benefisial sebidang tanah ('tanah tersebut'), mereka telah mengalami kerugian dan kerosakan dan oleh itu menuntut ganti rugi terhadap defendan-defendan kerana mengemukakan kaveat dengan salah atau mengemukakan kaveat tanpa alasan yang munasabah atas tanah tersebut dan kerana secara salah dan dengan niat jahat berkomplot untuk memfraud dan merugikan plaintif pertama. Plaintif pertama telah membeli tanah tersebut daripada pegawai penerima yang merupakan pegawai penyelesai pemunya berdaftar tanah tersebut ('Mosbert Bhd') di bawah suatu perjanjian bertarikh 1 April 1981. Defendan kedua telah mengemukakan suatu kaveat ke atas tanah tersebut bahawa disebabkan serahhak semula yang berturut, defendan pertama telah menyerahhak semula haknya ke atas 30 sub-lot atas tanah tersebut kepada defendan kedua. Kaveat itu kemudiannya dibatalkan menurut suatu permohonan oleh pegawai penerima, dalam nama Mosbert Bhd, dan untuk dan bagi pihak plaintif pertama. Tindakan akhirnya ditetapkan untuk perbicaraan pada 7 November 1994, tetapi sebelum tarikh itu, defendan-defendan telah memohon menerusi saman dalam kamar meminta mahkamah supaya menggunakan A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi menentukan isu permulaan tertentu.

Afidavit defendan-defendan yang menyokong permohonan menyatakan bahawa jika isu-isu undang-undang ini diputuskan oleh mahkamah memihak kepada defendan-defendan dari permulaan, akibatnya adalah mungkin tuntutan plaintif-plaintif akan ditolak. Plaintif-plaintif membantah permohonan dengan berhujah bahawa adalah terlalu lewat untuk defendan-defendan memfailkan permohonan sedemikian kerana writ bersama dengan pernyataan tuntutan difailkan pada 9 Mei 1988; bahawa pliding telah tutup dan bahawa tindakan itu telah ditetapkan untuk perbicaraan.

Hakim perbicaraan telah menolak permohanan itu dengan kos, oleh itu rayuan ini dibuat. Ia dihujahkan bagi pihak defendan-defendan bahawa plaintif-plaintif kini tidak boleh menuntut ganti rugi sebab mereka sepatutnya berbuat demikian ketika memohon pembatalan kaveat. Plaintif-plaintif berhujah bahawa soalan atau isu-isu yang dibangkitkan dalam pliding tidak boleh dibicarakan atas afidavit sahaja sama ada untuk menentukan hujah undang-undang atau kedua-dua undang-undang dan fakta.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim perbicaraan adalah betul apabila beliau mendapati isu-isu di hadapannya tidak mempunyai merit bagi pelaksanaan budi bicara, dengan mengingati tahap ketika soalan-soalan dikemukakan terutamanya hampir di tarikh yang ditetapkan untuk pembicaraan kes. Adalah juga jelas bahawa hakim perbicaraan berpendapat bahawa jika pun permohonan dibenarkan, ianya tidak akan mengakhiri perbicaraan secara muktamad tetapi sebaliknya akan menambahkan kelewatan kepada kes.

Mahkamah bersetuju dengan penentang dalam hujah bahawa perayu-perayu telah gagal memuaskan mahkamah bahawa jika permohonan mereka dibenarkan akan menjimatkan masa dan belanja yang agak banyak, dan adalah benar bahawa beberapa soalan atau isu yang dibangkitkan perlu dijelaskan oleh keterangan dan oleh yang demikian tidak boleh dianggap sebagai hujah permulaan (lihat ms 261C–D, 262I dan 264B–C).

(2) Plaintif-plaintif tidak patut dinafikan peluang untuk menuntut pampasan di bawah s 329 Kanun Tanah Negara 1965 oleh kerana apabila pegawai penerima menjual tanah tersebut kepada plaintif pertama pada 1 April 1981, kaveat yang dikemukakan oleh defendan kedua belum lagi wujud. Hanya apabila plaintif pertama cuba menguatkuasakan pendaftaran tanah tersebut barulah didedahkan bahawa defendan kedua telah mengemukakan kaveat itu.

Juga, plaintif pertama bukanlah suatu pihak kepada prosiding apabila pegawai penerima, dalam nama Mosbert Bhd, membuat permohonan untuk membatalkan kaveat; oleh itu, estopel tidak boleh digunakan terhadap plaintif pertama yang bukan merupakan suatu pihak kepada prosiding itu.

Seterusnya, fakta bahawa pegawai penerima tidak menuntut ganti rugi tidak menghalang plaintif-plaintif daripada membuat tuntutan untuk ganti rugi dalam tindakan yang berasingan. Isu-isu sama ada plaintif kedua mempunyai kausa tindakan dan sama ada plaintif pertama boleh menyerahhak haknya kepada plaintif kedua hanya boleh ditentukan di perbicaraan. Plaintif pertama adalah suatu pihak kepada prosiding dan jika mahkamah mendapati bahawa kausa tindakan tidak boleh diserahhak, itu tidak boleh menghalang plaintif pertama daripada membuat tuntutan berdasarkan kepentingan sebelum serahhak (lihat ms 263G–I dan 264A–B).]

Notes

For cases on preliminary objection, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2773–2774.

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2428.

Cases referred to

Richards v Naum [1966] 3 All ER 812 (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (refd)

Legislation referred to

National Land Code 1965 s 329

Rules of the High Court 1980 O 33 r 2

Appeal from: Civil Suit No 22–119 of 1988 (High Court, Johor Bahru)

Civil Appeal No J–02–32–95:
Dominic J Puthucheary (Skrine & Co) for the appellant.
P Suppiah (J Singh & Co) for the respondents.

Civil Appeal No J–02–33–95
DP Naban (*Sunny Liew* with him) (*Lee Hishamuddin*) for the appellants.
P Suppiah (J Singh & Co) for the respondents.

23 November 1995

Mahadev Shankar JCA: I have had the opportunity of reading the draft judgment of my brother judge, Abu Mansor JCA in this matter with which I concur.

14 October 1995

Abu Mansor JCA: At the conclusion of this appeal No 9 and No 10, we dismissed them with cost and ordered that the deposit be paid to the respondents on account of taxed cost. We said we would give our reasons and we now do so.

For the purpose of acquainting ourselves with the facts of this case and the events leading to this appeal, we find it useful to set down in some detail the relevant passages of the judgment of his Lordship, the learned trial judge. At pp 34–41 of the appeal record, he found as follows:

> On 9 May 1988, the plaintiffs brought an action against the defendants claiming that, as beneficial owners of a piece of land known as Lot 83, Johore Grant No 72 and situated within the district of Johor Bahru ('the land'), containing an area of approximately 113 acres, 2 roods and 20 poles, they have been 'greatly injured in the investment and development thereof and have lost the right to resell it at a high profit at the appropriate time and they have been put to considerable trouble, inconvenience and expenses and have suffered loss and damage' and hence, claim damages and compensation against the defendants for wrongfully or without reasonable cause caveating the land and for wrongfully and maliciously conspiring to defraud and to injure the first plaintiff between 1 April 1981 and 9 December 1987.
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> In the statement of claim, the first plaintiff contended that it had purchased the land from the official receiver under an agreement dated 1 April 1981 for the sum of RM2,005,750 and had paid the full purchase price. The registered owner of the land was Mosbert Bhd, which was wound up on 12 January 1977 by the High Court in Johor Bahru and in that proceeding, the court appointed the official receiver as liquidator and receiver for that company. The first plaintiff stated that upon payment of the full purchase price, the official receiver handed the issue document of title and the executed transfer to enable it to register the land in its name as owner.
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> However, on 17 January 1982, the second defendant lodged a caveat expressed to bind the whole land itself. In the application to lodge the caveat, the second defendant stated that by 26 re-assignments dated 17 January 1982, the first defendant has re-assigned its rights over 30 sub-lots on the land, containing an approximate area of 6,000 square feet each, to the second defendant.

A The first plaintiff claimed that as a result of the caveat, it was unable to effect registration of the land into its name and consequently requested the second defendant to remove the caveat or alternatively to give its consent to the transfer subject to the caveat, but was not successful. The first plaintiff claimed that the defendants were fully aware that the land had been purchased by the first plaintiff, as the first defendant had also tendered for the land and B for an adjoining piece of land containing 116 acres and known as Lot No 6, but was successful in purchasing only that adjoining piece of land.

The plaintiffs further contended that the defendants were fully aware of the purchase as the third to the sixth defendants, who are brothers and also advocates and solicitors, were either directors of the first and second defendants or were acting as solicitors for the first or second defendants at C the relevant time. Furthermore, the fourth defendant appeared as counsel for the petitioner in the winding-up proceedings of Mosbert Bhd. The plaintiffs claimed that the defendants, by virtue of knowledge acquired with regard to the background leading to the purchase of the land by the first plaintiff, had misused that information and had contacted the original purchasers of the sub-lots and consequently bought their rights on the land.

D In para 34 of the statement of claim, the plaintiffs stated that the official receiver, in the name of Mosbert Bhd, and for and on behalf of the first plaintiff, had on 2 November 1983 made an application in the High Court in Johor Bahru to remove the caveat lodged by the second defendant for the reason that the land has been sold to the first plaintiff and for the further reason that the second defendant did not have a caveatable interest E on the land. Subsequently, by an order of the High Court dated 17 January 1987, the said caveat was removed and on appeal, the decision was upheld by the then Supreme Court. On 23 April 1988, the first plaintiff informed the defendants of the assignment of the land from the first to the second plaintiff.

F In their defence, the defendants denied the plaintiffs' claims and contended that the Supreme Court upheld the High Court's decision solely on the fact that the second defendant had not complied with the requirements of s 323(2) of the National Land Code 1965 when the caveat was lodged. That section provides that a person or body wishing to apply for the entry of a caveat shall specify therein the nature of the claim on which his application is based and whether the caveat is to be expressed to bind the G land itself or a particular interest only. The defendants also contended that they had bought the rights over the sub-lots from the original purchasers prior to the sale of the land to the first plaintiff. Furthermore, they stated that there were also other caveats lodged in respect of the land even before the first plaintiff entered into the said agreement to purchase it.

H The action, after an adjournment at the request of the defendants, was finally set down for trial on 7 November 1994, but prior to that date, the defendants filed an application by way of summons in chambers requesting the court to evoke O 33 r 2 of the Rules of the High Court 1980 for an order that the following questions or issues arising in the cause of the action be determined first before the trial, namely:

I 1 (a) Does the tort of conspiracy in respect of wrongful caveats exist by reason of the provisions of the Civil Law Act 1956 and the National Land Code 1965.

(b) Alternative to objection (1) above and in any event, do any of the plaintiffs have a cause of action against the defendants in the tort of

conspiracy to lodge a wrongful caveat on the facts as pleaded in the statement of claim.

(c) Can the first plaintiff now claim damages against the second defendant for allegedly lodging wrongful or without reasonable cause caveats, when in fact the application to remove filed by the official receiver in the name of Mosbert Bhd was for and on behalf of the first plaintiff as stated in para 34 of the statement of claim.

(d) Did the second defendant have a caveatable interest on the subject land at the time it lodged its caveat?

(e) Could, in law, the caveat lodged by the second defendant have caused the plaintiffs to suffer the damages allegedly suffered by the plaintiffs in view of there being other prior caveats at the time when the second defendant lodged its caveat and there being other caveats at the time when the second defendant's caveat was removed?

(f) Does the second plaintiff have a cause of action against the defendants in respect of the facts alleged in the statement of claim?

(g) Could the first plaintiff, in law, assign its cause of action against the defendants (if such existed in law) in respect of the caveat lodged by the second defendant?

The defendants' affidavit in support of the application states that if these questions or issues of law are determined by the court in favour of the defendants at the outset, the consequential effect could be that the plaintiffs' claim would be dismissed. Affixed to the said affidavit were copies of 26 agreements relating to the re-assignments entered into between the original purchasers of the sub-lots and the first defendant which were dated 20 June 1981 except for one agreement which was dated 23 November 1982, and also attached therewith were copies of the judgments of both the High Court and Supreme Court with regard to the earlier proceedings instituted by the official receiver relating to the caveat lodged by the second defendant as discussed above.

In their affidavit in reply, the plaintiffs opposed the application contending that it was too late in the day for the defendants to file such an application as the writ itself, together with the statement of claim, was filed on 9 May 1988, that pleadings had closed and that the action has been set down for trial.

The plaintiffs contended that the questions or issues raised in the pleadings cannot be tried by affidavits alone either to determine points of law or mixed law and facts; furthermore the defendants have not raised those points of law in their defence to enable them to make the application. The plaintiffs further contended that the application is misconceived and urged the court to dismiss it and to let the action proceed as fixed.

As both the application and the action had been set down for trial on the same day, the learned judge then ordered that the application be heard first. His Lordship duly proceeded to hear the application under O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). In a lengthy and careful judgment, the learned judge answered the questions posed before him as follows:

In conclusion I find that the defendants have failed to satisfy me that their application, if allowed, will result in a substantial saving of time and

A expenditure which otherwise would have to be expended should the action go on trial as a whole. The several questions or issues raised need to be clarified by evidence and as such cannot be considered to be preliminary points and ordered to be tried as such. That being so, I dismissed this application with costs and direct that an early date be set down once again for trial of the whole action.

B Mr Naban for the appellant in the second appeal addressed us first. He said that as the issues to be argued are identical in both appeals, it would be convenient if he was to commence and Datuk Dominic Puthucheary address us after that, followed by the reply by Mr Suppiah, counsel for the respondent. We agreed.

C Mr Naban first referred us to the amended summons in chambers at p 151 of the appeal record wherein, as we have seen, are set out all the issues requiring the learned judge's determination.

In his usual forceful self, Mr Naban contended, not in so many words, that the learned judge acted wrongly in not having determined the D issues posed by the appellants before him. If the learned judge had done so, he submitted, it would have had a conclusive effect and no further time would be wasted.

According to Mr Naban, the fact that this case was originally scheduled for hearing from 7–9 November 1994 would not have mattered because E the sixth defendant/appellant was taken ill and he was not fit to attend court. In its history, this case was before that fixed for hearing on 8 March 1994 and it had to be postponed as the sixth defendant first became unwell. It was because of this adjournment that the appellants applied to have the first to fifth issues determined. It was wrong to say that as a result of the application the case was postponed, because the case would have F had to be inevitably taken off because of sixth defendant's illness.

Mr Naban further submitted that the issue in item 1(e) was a legal issue which, according to Mr Naban, was far from being complex. In short, could Easow Plantations Sdn Bhd, the second respondent, have caveated the land? There should not be any delay for the learned judge to G answer this question.

Mr Naban then referred us to the supporting affidavit of Datuk Dominic Puthucheary, at pp 179–284 of the appeal record, and to the several records of caveats lodged subsequent to the one ordered to be removed by the Supreme Court. Mr Naban further submitted the learned H judge could have determined this issue raised in item 1(e) and it would have then brought an end to this trial without any harassment and with no waste of time. No evidence needed be called and based on the undisputed facts as disclosed in the affidavit, such facts not having been denied, the trial would have concluded.

Mr Naban further submitted that the only claim left against the other I defendants, other than that of Easow Plantations, is for conspiracy. He said even if there is a conspiracy to lodge a wrongful caveat, since it was already done, it would have merged with other acts and he submitted this issue can be determined without a trial. He submitted that if the appellate

court was with him on this submission, then he prayed that directions might be issued by this court that these issues be heard by another judge. A

Finally, as regards item 1(g), at p 153 of the appeal record, since the second respondent/plaintiff was the alleged assignee of the cause of action alleged to have accrued in favour of the first plaintiff, can that right be assigned? He submitted the plaintiffs could not now claim for damages because they should have done so when praying for the removal of the caveat. He submitted it is settled law that the plaintiffs are not allowed to litigate piece meal and since they did not do so previously, they are therefore estopped and he submitted that the plaintiffs' case against the second defendant is therefore at an end and in a wider sense, he submitted, res judicata, citing the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 (HL) wherein it was held that it would be an abuse of the process of the court to raise in a subsequent proceedings matters which could and should have been litigated earlier. B C

Mr Naban then made, what to us, was a startling submission that for the purpose of this preliminary hearing, no evidence need to be led except for issues (b) and (e). As regards item 1(e), the question could be answered by the lower court using the facts, as disclosed in the affidavit of Datuk Dominic Puthucheary, as to the existence of existing and previous caveats. If this court could find favour with his submission, the appellants were willing to abandon the issue in item 1(d) since that question, he said, required evidence before it could be answered. D E

In so applying, Mr Naban somewhat conceded there was some delay in their making this application, since the pleadings were closed on 11 December 1988 and this application came to be filed only shortly prior to 7 November 1994. He submitted that while there has been delay, he said, it had not prejudiced anybody. F

Datuk Dominic Puthucheary, apart from supporting Mr Naban's submission, wanted to highlight points in his affidavit filed, particularly para 5 at p 183 of the appeal record to the effect that the caveat lodged by the second defendant on 20 January 1982 was over the said piece of land in Plentong and limited to certain sub-lots of the said land claimed by the second defendant which the defendant has not denied caveating but in defence said that others had also caveated the said land and for which the second defendant could not be held in damages. After that, he was content to leave these appeals to the courts. G

Mr Suppiah in reply correctly summed up the orders prayed for by the appellants in these appeals. It was that they wanted the learned judge's decision be set aside and the issues in their application be remitted to be heard by another judge. H

Mr Suppiah submitted that before this court could begin to do so, this court must scrutinize not only the law but the facts as well.

The initial observation of Mr Suppiah was that, in this application, the sixth defendant did not apply. At p 151 of the appeal record, the entire issues were reframed and that a complete new version came about. Mr Suppiah further remarked that it was clear from the appellants' I

application that the appellants did not want the case to go to trial. If the appellants wanted, they could easily have allowed the case to go to trial and then, after undertaking not to call any witness, make a submission of no case to answer and stood on it. He said it was clear law that an O 33 application could only be resorted to in clear cases where it involved law or mixed law and facts. Mr Suppiah drew the court's attention to the fact that after the dismissal of the appellants' application, they had amended their defence as found at pp 97 and 98 of appeal record.

What the appellants asked of us was to disturb the learned judge's judgment. That would depend on how we view his decision. After listening to arguments, we asked whether the exercise of the learned judge's discretion was on wrong principles.

We are with the learned judge when he found the issues before him had no merit for the exercise of his discretion, bearing in mind the stage when the questions were posed, especially at almost the date fixed for the hearing of the case. The learned judge was entirely correct when at p 51 of the appeal record he asked:

> Thus, the issue before me is whether there are merits in the application to warrant the court to exercise its power under O 33 r 2 of the Rules and order that those questions or issues posed by the defendants in this application be tried before this action goes on trial as a whole and whether the trial of those preliminary questions or issues will result in a substantial saving of time and expenditure.

As if in the next breath, the learned judge answered and cited a relevant case to base his decision on, thus:

> Counsel for the plaintiffs had earlier contended that the application was made too late in the day as the writ was filed on 9 May 1988 and that pleadings have closed. I agree with this contention. In *Carl-Zeiss Stiftung v Herbert Smith & Co & Ors* [1969] 1 Ch 93 (CA) at p 98, the judge said:
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> > 'The true rule was stated by Romer LJ in *Everett v Ribbands* [1952] 2 QB 206:
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> > > "Where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings." '
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> In that case, the judge seems to suggest that the opportune time to take advantage of such rule would be at the close of pleadings or very shortly after the close of pleadings. The records of the instant case shows otherwise. On 4 September 1993, on the application of the plaintiffs, the court ordered that an early date be given for the suit to be heard and subsequently the action was set down for trial on 2 April 1994. However, on that date, the matter was adjourned upon request by the defendants on the ground that the sixth defendant has suffered a stroke and could not attend court. I find that the records clearly show that the defendants had ample time to make this application after pleadings had closed but had waited until almost the eleventh hour before doing so. They had not put forth any reason for the delay and upon this ground alone I am of the view that this application should be dismissed.

One of Mr Naban's contention before us was that, if the questions were answered that would end this trial! The learned judge having duly considered it, as it appears at p 53 of the appeal record, has himself answered him. Mr Naban's submission was that there was no necessity of calling evidence and the issues in this case, if answered would have a decisive effect. The learned judge said:

> In the instant case, the contents of the pleadings and affidavits including the documents attached therein cannot, under the circumstances, amount to evidence adduced, neither have the parties submitted an agreed statement of facts or an agreed bundle of documents which could have at least assisted the court in giving due consideration to the application. It is clear that no court should decide a case when facts are disputed and the order for the trial of a preliminary point of law should not be made where there are facts in dispute. In the instant, several facts are disputed.

The learned judge continued at p 54 of the appeal record why he declined to have the seven questions answered thus:

> Be that as it may, I find that the questions or issues posed by the defendants, being voluminous, may not actually save time and costs of the legal proceedings even if this application is allowed upon only one of the questions or issues raised. To me, those seven questions or issues encompass the entire action and without an agreed statement of facts, the court would be placed in a very difficult position to try those preliminary questions or issues as there could be other facts beyond those that appear in the pleadings; for example, the defendants contended that they bought the rights over the sub-lots from the original purchasers prior to the sale of the said land to the first plaintiff whereas most of the agreements entered into between the original purchasers and the first defendant, copies of which are attached to the defendants' affidavit, show otherwise.
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> Further, the law posed by one of those questions, in my opinion, is unsettled, namely the defendants argued that the tort of conspiracy in respect of wrongful caveats does not exist in this country by reasons of the provisions of the National Land Code 1965. To me, this is a difficult and important question of law, and before the court can make a decision on this point, the facts of the instant case should be ascertained first.

As we read further the judgment of the learned judge, we were left with the impression that the learned judge had duly appraised himself of all the issues before him and the issues of facts that needed to be properly ventilated at a proper trial before a court could properly come to a just and final decision.

Then, the learned judge proceeded to cite the case of *Richards v Naum* [1966] 3 All ER 812 where, at p 815, Lord Denning MR gave a glimpse of the attitude of the English Court in regard to the question of preliminary issues:

> If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say: 'You must get the facts before we decide the law'.

The learned judge, as if in answer to Mr Naban, had present in his mind that the granting of the application will not conclusively end this trial but

instead, he said, will contribute to a further delay of the case. At p 57 of his judgment, he said thus:

> In the instant case, the events took place between 1981 and 1987 and the action was started in May 1988. It is now nearly eight years later. In *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353, the court cautioned against allowing trial of preliminary questions of law and said that such questions should be carefully and precisely framed. At p 364, Lord Roskill said:
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> > 'My Lords, in common with all your Lordships, I agree that this should be treated as the question to be answered. But I hope your Lordships' agreement so to treat it will not encourage others to invoke the preliminary point procedure in unsuitable cases, or lead those whose task it is to decide whether or not the trial of preliminary point should be ordered to be other than extremely cautious before acceding to pleas for the making of such orders as a result of attractively advanced submissions founded on pleas of supposed economy.'

The learned judge then went on:

> On the same note, Lord Wilberforce has this say in *Tilling v Whiteman* [1980] AC 1 at p 17:
>
> > 'The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.'

We uphold the submission of the counsel for the respondents, when the learned judge examined the question of whether the plaintiffs are estopped from claiming compensation under s 329 of the National Land Code 1965. We were in agreement with his analysis why the plaintiffs should not be deprived. We take note that when the official receiver sold the land to the first plaintiff on 1 April 1981, the caveat lodged by the second defendant had yet to exist. It is only when the first plaintiff attempted to effect the registration of the land to itself that it was disclosed that the second defendant lodged the caveat.

The first plaintiff was not a party to the proceedings when the official receiver, in the name of Mosbert Bhd, made an application to remove the caveat. The learned judge says he cannot see how an estoppel can operate against the first plaintiff who had not been a party to those proceedings.

The fact that the official receiver did not claim damages in the earlier proceedings cannot then preclude the plaintiffs from pursuing their claim for damages on a separate action. In any case, this difficult question can only be answered at the end of a full trial, we agree. We are also with the

respondents in their submission that whether the second plaintiff has a cause of action and whether the first plaintiff can assign its rights to the second plaintiff could only be determined at the trial. The first plaintiff is a party to the proceedings and if the court finds that the cause of action cannot be assigned, that would not preclude the first plaintiff from pursuing the claim based upon its interest before the assignment.

After having considered all aspects of this appeal and the careful and thorough judgment of the learned judge, we fail to find any error that would justify us, in law, interfering with his decision. We find we are with the respondent in their submission that the appellants have failed to satisfy the court that their application, if allowed, will result in a substantial saving of time and expenditure, and we say that it is true that the several questions or issues raised need to be clarified by evidence and as such cannot be considered to be preliminary points and ordered to be tried as such.

We are inclined to dismissed both appeals and since the learned judge has ordered early trials that should follow. The appeals are dismissed with costs and the costs be paid to the respondents on account of taxed costs. As requested by Mr Naban, we also made a consequential order that the trial of this case would be before a judge other than the judge who heard this application.

Appeals dismissed.

Reported by Eugene Lee Hong Whye